

- (vi) Description, amount, and maintenance of collateral if any;
- (vii) Trustee provisions if any;
- (viii) Events of default and remedies of default;
- (ix) Any provisions which restrict, conditionally or otherwise, the operations of the association.

(2) The appropriate Federal banking agency shall have 10 business days after receipt of such filing to object to the issuance of such securities. The appropriate Federal banking agency shall object if the terms or covenants of the proposed issue place unreasonable burdens on, or control over, the operations of the association. If no objection is taken, the savings association shall have 120 calendar days within which to issue such securities.

(f) *Note accounts.* For purposes of this section, note accounts are not borrowings.

[76 FR 49047, Aug. 9, 2011, as amended at 79 FR 11314, Feb. 28, 2014]

§ 163.81 Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as supplementary (tier 2) capital.

(a) *Applicability and scope*—(1) *Applicability.* (i) For purposes of this section, an advanced approaches savings association means a Federal savings association that is subject to 12 CFR part 3, subpart E, and a non-advanced approaches savings association means a Federal savings association that is not subject to 12 CFR part 3, subpart E.

(ii) An advanced approaches savings association, beginning on March 31, 2014, must comply with paragraphs (h) through (q) of this section.

(iii) A non-advanced approaches savings association, prior to January 1, 2015, must comply with paragraphs (a) through (g) of this section. Beginning on January 1, 2015, a non-advanced approaches savings association must comply with paragraphs (h) through (q) of this section.

(2) *Scope.* Prior to January 1, 2015, a non-advanced approaches savings association must comply with paragraphs (a) through (g) of this section in order to include subordinated debt securities or mandatorily redeemable preferred stock (“covered securities”) in supplementary capital (tier 2 capital) under

part 167 of this chapter. If a savings association does not include covered securities in supplementary capital, it is not required to comply with this section. Covered securities not included in tier 2 capital are subject to the requirements of § 163.80.

(b) *Application and notice procedures.*

(1) A Federal savings association must file an application or notice under 12 CFR part 116, subpart A seeking the OCC’s approval of, or non-objection to, the inclusion of covered securities in supplementary capital. The savings association may file its application or notice before or after it issues covered securities, but may not include covered securities in supplementary capital until the OCC approves the application or does not object to the notice.

(2) A savings association must also comply with the securities offering rules at 12 CFR part 197 by filing an offering circular for a proposed issuance of covered securities, unless the offering qualifies for an exemption under that part.

(c) *Securities requirements.* To be included in supplementary capital, covered securities must meet the following requirements:

(1) *Form.* (i) Each certificate evidencing a covered security must:

(A) Bear the following legend on its face, in bold type: “This security is *not* a savings account or deposit and it is *not* insured by the United States or any agency or fund of the United States;”

(B) State that the security is subordinated on liquidation, as to principal, interest, and premium, to all claims against the savings association that have the same priority as savings accounts or a higher priority;

(C) State that the security is not secured by the savings association’s assets or the assets of any affiliate of the savings association. An affiliate means any person or company which controls, is controlled by, or is under common control with the savings association;

(D) State that the security is not eligible collateral for a loan by the savings association;

(E) State the prohibition on the payment of dividends or interest at 12 U.S.C. 1828(b) and, in the case of subordinated debt securities, state the prohibition on the payment of principal and

interest at 12 U.S.C. 1831o(h), 12 CFR 3.11, and any other relevant restrictions;

(F) For subordinated debt securities, state or refer to a document stating the terms under which the savings association may prepay the obligation; and

(G) State or refer to a document stating that the savings association must obtain OCC's approval before the voluntary prepayment of principal on subordinated debt securities, the acceleration of payment of principal on subordinated debt securities, or the voluntary redemption of mandatorily redeemable preferred stock (other than scheduled redemptions), if the savings association is undercapitalized, significantly undercapitalized, or critically undercapitalized as described in §6.4 of this chapter, fails to meet the regulatory capital requirements at 12 CFR part 167, or would fail to meet any of these standards following the payment.

(ii) A Federal savings association must include such additional statements as the OCC may prescribe for certificates, purchase agreements, indentures, and other related documents.

(2) *Maturity requirements.* Covered securities must have an original weighted average maturity or original weighted average period to required redemption of at least five years.

(3) *Mandatory prepayment.* Subordinated debt securities and related documents may not provide events of default or contain other provisions that could result in a mandatory prepayment of principal, other than events of default that:

(i) Arise from the Federal savings association's failure to make timely payment of interest or principal;

(ii) Arise from its failure to comply with reasonable financial, operating, and maintenance covenants of a type that are customarily included in indentures for publicly offered debt securities; or

(iii) Relate to bankruptcy, insolvency, receivership, or similar events.

(4) *Indenture.* (i) Except as provided in paragraph (c)(4)(ii) of this section, a Federal savings association must use an indenture for subordinated debt securities. If the aggregate amount of subordinated debt securities publicly

offered (excluding sales in a non-public offering as defined in 12 CFR 197.4) and sold in any consecutive 12-month or 36-month period exceeds \$5,000,000 or \$10,000,000 respectively (or such lesser amount that the Securities and Exchange Commission shall establish by rule or regulation under 15 U.S.C. 77ddd), the indenture must provide for the appointment of a trustee other than the savings association or an affiliate of the savings association (as defined in subsection (c)(1)(i)(C) of this section) and for collective enforcement of the security holders' rights and remedies.

(ii) A Federal savings association is not required to use an indenture if the subordinated debt securities are sold only to accredited investors, as that term is defined in 15 U.S.C. 77d(6). A savings association must have an indenture that meets the requirements of paragraph (c)(4)(i) of this section in place before any debt securities for which an exemption from the indenture requirement is claimed, are transferred to any non-accredited investor. If a savings association relies on this exemption from the indenture requirement, it must place a legend on the debt securities indicating that an indenture must be in place before the debt securities are transferred to any non-accredited investor.

(d) *Review by the OCC.* (1) The OCC will review notices and applications under 12 CFR part 116, subpart E.

(2) In reviewing notices and applications under this section, the OCC will consider whether:

(i) The issuance of the covered securities is authorized under applicable laws and regulations and is consistent with the savings association's charter and bylaws.

(ii) The savings association is at least adequately capitalized under §6.4 of this chapter and meets the regulatory capital requirements at part 167 of this chapter.

(iii) The savings association is or will be able to service the covered securities.

(iv) The covered securities are consistent with the requirements of this section.

(v) The covered securities and related transactions sufficiently transfer risk from the Deposit Insurance Fund.

(vi) The OCC has no objection to the issuance based on the savings association's overall policies, condition, and operations.

(3) The OCC's approval or non-objection is conditioned upon no material changes to the information disclosed in the application or notice submitted to the OCC. The OCC may impose such additional requirements or conditions as it may deem necessary to protect purchasers, the savings association, the OCC, or the Deposit Insurance Fund.

(e) *Amendments.* If a Federal savings association amends the covered securities or related documents following the completion of the OCC's review, it must obtain the OCC's approval or non-objection under this section before it may include the amended securities in supplementary capital.

(f) *Sale of covered securities.* The Federal savings association must complete the sale of covered securities within one year after the OCC's approval or non-objection under this section. A savings association may request an extension of the offering period by filing a written request with the OCC. The savings association must demonstrate good cause for the extension and file the request at least 30 days before the expiration of the offering period or any extension of the offering period.

(g) *Reports.* A Federal savings association must file the following information with the OCC within 30 days after the savings association completes the sale of covered securities includable as supplementary capital. If the savings association filed its application or notice following the completion of the sale, it must submit this information with its application or notice:

(1) A written report indicating the number of purchasers, the total dollar amount of securities sold, the net proceeds received by the savings association from the issuance, and the amount of covered securities, net of all expenses, to be included as supplementary capital;

(2) Three copies of an executed form of the securities and a copy of any related documents governing the

issuance or administration of the securities; and

(3) A certification by the appropriate executive officer indicating that the savings association complied with all applicable laws and regulations in connection with the offering, issuance, and sale of the securities.

(h) *Scope.* (1) Beginning March 31, 2014, an advanced approaches savings association must comply with paragraphs (h) through (q) of this section in order to include subordinated debt securities or mandatorily redeemable preferred stock ("covered securities") in tier 2 capital under 12 CFR 3.20(d) and to prepay covered securities included in tier 2 capital.

(2) Beginning January 1, 2015, a non-advanced approaches savings association must comply with paragraphs (h) through (q) of this section in order to include covered securities in tier 2 capital under 12 CFR 3.20(d) and to prepay covered securities included in tier 2 capital. A Federal savings association that does not include covered securities in tier 2 capital is not required to comply with this section. Covered securities not included in tier 2 capital are subject to the requirements of § 163.80.

(3) For purposes of this section, mandatorily redeemable preferred stock means mandatorily redeemable preferred stock that was issued before July 23, 1985 or issued pursuant to regulations and memoranda of the Federal Home Loan Bank Board and approved in writing by the Federal Savings and Loan Insurance Corporation for inclusion as regulatory capital before or after issuance.

(i) *Prior approval required for prepayment of covered securities included in tier 2 capital.* A Federal savings association must obtain prior OCC approval to prepay covered securities included in tier 2 capital. For purposes of this requirement, prepayment includes acceleration of a covered security, repurchase of a covered security, redemption of a covered security prior to maturity, and exercising a call option in connection with a covered security.

(j) *Application and notice procedures—*
(1) *Application or notice to include covered securities in tier 2 capital.* (i) A Federal savings association must file an application or notice under 12 CFR part

116, subpart A seeking the OCC's approval of, or non-objection to, the inclusion of covered securities in tier 2 capital. The savings association may file its application or notice before or after it issues covered securities, but may not include covered securities in tier 2 capital until the OCC approves the application or does not object to the notice.

(ii) A savings association also must comply with the securities offering rules at 12 CFR part 197 by filing an offering circular for a proposed issuance of covered securities, unless the offering qualifies for an exemption under that part.

(2) *Application to prepay covered securities included in tier 2 capital*—(i) *General*. A Federal savings association must file an application under 12 CFR part 116, subpart A seeking the OCC's prior approval to prepay covered securities included in tier 2 capital. The filing is subject to standard treatment under 12 CFR part 116, subpart E.

(ii) *Prepayment in the form of a call option*. (A) In addition to the information required by paragraph (j)(2) of this section, the application must include:

(1) A statement explaining why the Federal savings association believes that following the proposed prepayment the savings association would continue to hold an amount of capital commensurate with its risk; or

(2) A description of the replacement capital instrument that meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20, including the amount of such instrument, and the time frame for issuance.

(B) Notwithstanding paragraph (j)(1)(i) of this section, if the OCC conditions approval of prepayment in the form of a call option on a requirement that a Federal savings association must replace the covered security with a covered security of an equivalent amount that satisfies the requirements for a tier 1 or tier 2 instrument, the savings association must file an application to issue the replacement covered security and must receive prior OCC approval.

(k) *General requirements*. A covered security issued under this section must satisfy the requirements for tier 2 capital in 12 CFR 3.20(d).

(1) *Securities requirements for inclusion in tier 2 capital*. To be included in tier 2 capital, covered securities must satisfy the requirements in 12 CFR 3.20(d). In addition, such covered securities must meet the following requirements:

(1) *Form*. (i) Each certificate evidencing a covered security must:

(A) Bear the following legend on its face, in bold type: “This security is *not* a savings account or deposit and it is *not* insured by the United States or any agency or fund of the United States;”

(B) State that the security is subordinated on liquidation, as to principal, interest, and premium, to all claims against the savings association that have the same priority as savings accounts or a higher priority;

(C) State that the security is not secured by the savings association's assets or the assets of any affiliate of the savings association. An affiliate means any person or company which controls, is controlled by, or is under common control with the savings association;

(D) State that the security is not eligible collateral for a loan by the savings association;

(E) State the prohibition on the payment of dividends or interest at 12 U.S.C. 1828(b) and, in the case of subordinated debt securities, state the prohibition on the payment of principal and interest at 12 U.S.C. 1831o(h), 12 CFR 3.11, and any other relevant restrictions;

(F) For subordinated debt securities, state or refer to a document stating the terms under which the savings association may prepay the obligation; and

(G) Where applicable, state or refer to a document stating that the savings association must obtain OCC's prior approval before the acceleration of payment of principal or interest on subordinated debt securities, redemption of subordinated debt securities prior to maturity, repurchase of subordinated debt securities, or exercising a call option in connection with a subordinated debt security.

(ii) A Federal savings association must include such additional statements as the OCC may prescribe for certificates, purchase agreements, indentures, and other related documents.

(2) *Indenture.* (i) Except as provided in paragraph (c)(4)(ii) of this section, a Federal savings association must use an indenture for subordinated debt securities. If the aggregate amount of subordinated debt securities publicly offered (excluding sales in a non-public offering as defined in 12 CFR 197.4) and sold in any consecutive 12-month or 36-month period exceeds \$5,000,000 or \$10,000,000 respectively (or such lesser amount that the Securities and Exchange Commission shall establish by rule or regulation under 15 U.S.C. 77ddd), the indenture must provide for the appointment of a trustee other than the savings association or an affiliate of the savings association (as defined in subsection (c)(1)(i)(C) of this section) and for collective enforcement of the security holders' rights and remedies.

(ii) A Federal savings association is not required to use an indenture if the subordinated debt securities are sold only to accredited investors, as that term is defined in 15 U.S.C. 77d(6). A savings association must have an indenture that meets the requirements of paragraph (c)(4)(i) of this section in place before any debt securities for which an exemption from the indenture requirement is claimed, are transferred to any non-accredited investor. If a savings association relies on this exemption from the indenture requirement, it must place a legend on the debt securities indicating that an indenture must be in place before the debt securities are transferred to any non-accredited investor.

(m) *Review by the OCC.* (1) The OCC will review notices and applications under 12 CFR part 116, subpart E.

(2) In reviewing notices and applications under this section, the OCC will consider whether:

(i) The issuance of the covered securities is authorized under applicable laws and regulations and is consistent with the savings association's charter and bylaws;

(ii) The savings association is at least adequately capitalized under §6.4 of this chapter and meets the regulatory capital requirements at 12 CFR 3.10;

(iii) The savings association is or will be able to service the covered securities;

(iv) The covered securities are consistent with the requirements of this section;

(v) The covered securities and related transactions sufficiently transfer risk from the Deposit Insurance Fund; and

(vi) The OCC has no objection to the issuance based on the savings association's overall policies, condition, and operations.

(3) The OCC's approval or non-objection is conditioned upon no material changes to the information disclosed in the application or notice submitted to the OCC. The OCC may impose such additional requirements or conditions as it may deem necessary to protect purchasers, the savings association, the OCC, or the Deposit Insurance Fund.

(n) *Amendments.* If a Federal savings association amends the covered securities or related documents following the completion of the OCC's review, it must obtain the OCC's approval or non-objection under this section before it may include the amended securities in tier 2 capital.

(o) *Sale of covered securities.* The Federal savings association must complete the sale of covered securities within one year after the OCC's approval or non-objection under this section. A savings association may request an extension of the offering period by filing a written request with the OCC. The savings association must demonstrate good cause for the extension and file the request at least 30 days before the expiration of the offering period or any extension of the offering period.

(p) *Issuance of a replacement regulatory capital instrument in connection with exercising a call option.* Pursuant to 12 CFR 3.20(d)(1)(v)(C), the OCC may require a Federal savings association seeking prior approval to exercise a call option in connection with a covered security included in tier 2 capital to issue a replacement covered security of an equivalent amount that qualifies as tier 1 or tier 2 capital under 12 CFR 3.20. If the OCC imposes such a requirement, the savings association must

complete the sale of such covered security prior to, or immediately after, the prepayment.¹

(q) *Reports.* A Federal savings association must file the following information with the OCC within 30 days after the savings association completes the sale of covered securities includable as tier 2 capital. If the savings association filed its application or notice following the completion of the sale, it must submit this information with its application or notice:

(1) A written report indicating the number of purchasers, the total dollar amount of securities sold, the net proceeds received by the savings association from the issuance, and the amount of covered securities, net of all expenses, to be included as tier 2 capital;

(2) Three copies of an executed form of the securities and a copy of any related documents governing the issuance or administration of the securities; and

(3) A certification by the appropriate executive officer indicating that the savings association complied with all applicable laws and regulations in connection with the offering, issuance, and sale of the securities.

[79 FR 11314, Feb. 28, 2014]

Subpart D [Reserved]

Subpart E—Capital Distributions

§ 163.140 What does this subpart cover?

This subpart applies to all capital distributions by a Federal savings association (“you”).

§ 163.141 What is a capital distribution?

A capital distribution is:

(a) A distribution of cash or other property to your owners made on account of their ownership, but excludes:

(1) Any dividend consisting only of your shares or rights to purchase your shares; or

(2) If you are a Federal mutual savings association, any payment that you

are required to make under the terms of a deposit instrument and any other amount paid on deposits that the OCC determines is not a distribution for the purposes of this section;

(b) Your payment to repurchase, redeem, retire or otherwise acquire any of your shares or other ownership interests, any payment to repurchase, redeem, retire, or otherwise acquire debt instruments included in your total capital under 12 CFR part 3 or part 167, as applicable, and any extension of credit to finance an affiliate’s acquisition of your shares or interests;

(c) Any direct or indirect payment of cash or other property to owners or affiliates made in connection with a corporate restructuring. This includes your payment of cash or property to shareholders of another association or to shareholders of its holding company to acquire ownership in that association, other than by a distribution of shares;

(d) Any other distribution charged against your capital accounts if you would not be well capitalized, as set forth in 12 CFR 6.4, following the distribution; and

(e) Any transaction that the OCC determines, by order or regulation, to be in substance a distribution of capital.

[76 FR 49047, Aug. 9, 2011, as amended at 79 FR 11317, Feb. 28, 2014]

§ 163.142 What other definitions apply to this subpart?

The following definitions apply to this subpart:

Affiliate means an affiliate, as defined under regulations of the Board of Governors of the Federal Reserve System regarding transactions with affiliates, 12 CFR part 223 (Regulation W).

Capital means total capital, as computed under 12 CFR part 3 or part 167, as applicable.

Net income means your net income computed in accordance with generally accepted accounting principles.

Retained net income means your net income for a specified period less total capital distributions declared in that period.

Shares means common and preferred stock, and any options, warrants, or other rights for the acquisition of such stock. The term “share” also includes

¹ A Federal savings association may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.